

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF SOUTH CAROLINA

In re:

Kathy Rouse Burns a/k/a Kathy Jo Burns f/k/a
Kathy Jo Rouse,

Debtor.

C/A No. 15-01927-jw

Chapter 13

ORDER

This matter comes before the Court upon the motion (“Motion”) filed on June 25, 2015 by Green Tree Servicing LLC (“Green Tree”), seeking relief from the automatic stay pursuant to 11 U.S.C. § 362(d)(1).¹ Kathy Rouse Burns (“Debtor”) filed an objection to the Motion on July 7, 2015.

This Court has jurisdiction over this matter as a core proceeding pursuant to 28 U.S.C. §§ 1334 and 157. Pursuant to Fed. R. Civ. P. 52, which is made applicable to this matter by Fed. R. Bankr. P. 7052 and 9014(c), and based upon the filings of the parties in this matter, the testimony of the witnesses, the arguments and statements of counsel at the hearing, and the evidence presented at the hearing, the Court makes the following findings of fact and conclusions of law.²

FINDINGS OF FACT

1. The Debtor filed a voluntary petition for relief under Chapter 13 of the Bankruptcy Code on April 8, 2015 (“Petition Date”).

2. On March 20, 2001, Debtor’s father, Elijah W. Rouse, executed a Manufactured Home Retail Installment Contract and Security Agreement to Sensible Housing, Destiny Homes

¹ Further citations to sections of the United States Bankruptcy Code (11 U.S.C. § 101, et seq.) shall be by cited section number only.

² To the extent that any of the findings of fact constitute conclusions of law, they are adopted as such, and to the extent that any of the conclusions of law constitute findings of fact, they are so adopted.

(“Retail Installment Contract”) to purchase a 1997 Fleetwood manufactured home (“Manufactured Home”). Sensible Housing, Destiny Homes assigned the Retail Installment Contract to Conseco Finance Servicing Corporation. Among other things, the Retail Installment Contract required that insurance be maintained on the Manufactured Home.

3. On July 12, 2001, the Department of Motor Vehicles for the State of South Carolina issued a certificate of title for the Manufactured Home, listing Conseco Finance Servicing Corporation as the first lienholder.

4. Green Tree is the successor in interest to Conseco Finance Servicing Corporation by merger.

5. Prior to the Petition Date, Elijah W. Rouse died and Debtor apparently inherited an interest in the Manufactured Home.

6. On October 14, 2014, the insurance coverage for the Manufactured Home lapsed and Green Tree obtained a year-long policy of force placed insurance. Green Tree collected the advances from the force placed insurance policy in monthly installments from the Debtor.³

7. At the hearing, Green Tree presented three letters into evidence sent by Green Tree to Elijah W. Rouse dated September 9, 2014, October 14, 2014 and November 4, 2014 (“Insurance Letters”). The Insurance Letters stated that Green Tree purchased force placed insurance for the Manufactured Home and instructed Elijah W. Rouse to immediately notify Green Tree if he purchased his own hazard insurance. Although Debtor, along with her mother, resides at the address where the Insurance Letters were sent, Debtor testified that she was neither aware of nor received the Insurance Letters directed to her father from Green Tree.

³ Green Tree advanced several pre-petition force placed insurance premiums. According to Green Tree’s Amended Proof of Claim filed on June 25, 2015, Green Tree advanced \$477.08 for the force placed insurance from November 2014 to March 2015. However, because these are pre-petition advances addressed by Debtor’s confirmed Chapter 13 plan, the pre-petition advances will not be recognized by the Court as a basis of the Motion.

8. Prepetition, on March 25, 2015, Debtor obtained an insurance policy from Southern General Insurance Company with coverage on the Manufactured Home of up to \$14,000.00.⁴ Debtor has maintained this insurance coverage throughout the course of this case.

9. Debtor's confirmed Chapter 13 plan (the "Plan") valued Green Tree's claim secured by the Manufactured Home under § 506(a) at \$17,000.00. Furthermore, in both Green Tree's and Debtor's Certification of Facts filed in conjunction with the Motion, the value of the Manufactured Home is listed at \$17,000.00.

10. On June 25, 2015, Green Tree, through counsel, filed the Motion in which Green Tree alleged that it lacked adequate protection because Debtor has failed to reimburse Green Tree for post-petition force placed insurance premiums advanced in April, May and June of 2015. Additionally, Green Tree alleged in the Motion that Debtor has failed to provide evidence of her own insurance coverage.

11. According to statements by Green Tree's counsel, at the time of the filing of the Motion, neither Green Tree nor counsel for Green Tree was aware that, prior to petition, Debtor had obtained her own insurance policy for the Manufactured Home.

12. On July 7, 2015, Debtor objected to the Motion on the grounds that Debtor adequately protected Green Tree's interest by maintaining her own hazard insurance on the Manufactured Home since March 25, 2015. Additionally, in the objection, Debtor requested attorney's fees and sanctions against Green Tree and its counsel under Fed. R. Bankr. P. 9011(c).

13. At the hearing, Green Tree did not proceed on the allegations in its Motion regarding Debtor's nonpayment of Green Tree's post-petition insurance advances. Rather, Green

⁴ Debtor's insurance policy for the Manufactured Home lists Green Tree as the loss payee on the policy. It is common practice for insurance companies to provide loss payees with a copy of the insurance policy when the policy is originated. However, no specific evidence was presented to the Court regarding whether Southern General Insurance Company or Debtor mailed notice of Debtor's insurance policy to Green Tree.

Tree alleged that Debtor's insurance policy does not adequately protect Green Tree's interest in the Manufactured Home because Green Tree's allowed secured claim is greater than the coverage provided in Debtor's policy.

CONCLUSIONS OF LAW

1. Relief from the Automatic Stay under § 362(d)(1)

Green Tree asserts that it is entitled to termination of the automatic stay under § 362(d)(1) because Debtor's insurance coverage for the Manufactured Home is less than Green Tree's allowed claim.⁵ Section 362(d)(1) provides that the Court may grant a party relief from the automatic stay for cause, including lack of adequate protection of that party's interest in property. "A decision to lift the automatic stay under section 362 of the Code is within the discretion of the bankruptcy judge" In re Robbins, 964 F.2d 342, 345 (4th Cir. 1992).

This Court has previously conditioned the automatic stay upon the curing of a deficiency when circumstances exist that do not warrant the immediate termination of the stay. See, e.g., In re Ferguson, C/A No. 11-02958-jw, slip op. at 8–9 (Bankr. D.S.C. May 31, 2012) (conditioning the automatic stay upon debtor's payment of property taxes when debtor has maintained adequate protection payments to the creditor seeking relief); In re Toomer, C/A No. 10-07273-jw, 2011 WL 8899488, at *3 (Bankr. D.S.C. Oct. 5, 2011) (conditioning the automatic stay upon debtor's future payments to an oversecured creditor).

In the instant matter, Debtor properly obtained insurance on the Manufactured Home to provide coverage to Green Tree since the Petition Date. While the Court recognizes that Debtor's

⁵ In the Motion, Green Tree asserts it is entitled to relief under both § 362(d)(1) and § 362(d)(2); however, at the hearing, Green Tree prosecuted its Motion only under § 362(d)(1). Regardless, Green Tree would not be entitled to relief under § 362(d)(2). The Manufactured Home is Debtor's residence and therefore, appears necessary to an effective reorganization. Debtor has maintained regular payments to the Chapter 13 Trustee. Under the evidence presented, this Court finds that there is a reasonable prospect for a successful reorganization within a reasonable time if Debtor retains the Manufactured Home.

insurance policy does not fully cover Green Tree's allowed secured claim,⁶ in reviewing the totality of the circumstances, the Court does not find this deficiency to be sufficient cause to terminate the stay at this time. Debtor's policy covers a significant portion of Green Tree's allowed secured claim, and it appears likely that Debtor can remedy any deficiency in coverage by obtaining a new insurance policy or an increase in coverage of the current policy in the amount of Green Tree's allowed secured claim. Considering the Manufactured Home is Debtor's primary asset and Debtor is current on her payments to the Chapter 13 Trustee, the Court is persuaded that Debtor should have this opportunity. In fact, it appears that she is on track to pay all of Green Tree's allowed secured claim through the Plan. In light of Debtor's reasonable prospect of a successful reorganization and Debtor's ability to cure the deficiency in insurance coverage, it is premature to terminate the stay under § 362(d)(1) as to the Manufactured Home. Therefore, the Court denies Green Tree's Motion to immediately terminate the stay.

The Court finds the more appropriate action is to condition the automatic stay upon Debtor obtaining, within thirty days from the entry of this Order, a new insurance policy or an increase in coverage of the Debtor's current policy on the Manufactured Home that covers Green Tree's allowed secured claim in the amount of \$17,000.00. If Debtor fails to comply with the conditions set forth in this paragraph, Green Tree may file an affidavit of default and proposed order with the Court, and the Court may lift the stay, without further notice or hearing, to allow Green Tree to proceed with its state court remedies against the Manufactured Home.

⁶ While the balance of Green Tree's allowed secured claim has been reduced and will continue to be reduced by Debtor's payments to the Chapter 13 Trustee, no party presented evidence of the current remaining balance of Green Tree's allowed secured claim. Therefore, the Court will assume that the remaining balance is \$17,000.00 for the purposes of this Motion.

2. Sanctions Pursuant to Fed. R. Bankr. P. 9011

In her objection to the Motion, Debtor alleges she is entitled to attorney's fees and other sanctions against Green Tree and its counsel for violation of Fed. R. Bankr. P. 9011 because Green Tree's counsel did not conduct a reasonable inquiry regarding the existence of post-petition insurance on the Manufactured Home prior to filing the Motion. Specifically, Debtor alleges that Green Tree's counsel should have contacted Debtor's counsel about the status of the insurance coverage on the Manufactured Home prior to the filing.

The Court agrees that a reasonable inquiry was not made. The Motion filed by Green Tree was based upon a lack of insurance and a failure to reimburse post-petition insurance premiums advanced by Green Tree and appears based upon a failure to respond to correspondence which was several months old and sent prepetition. However, Debtor had obtained insurance coverage prepetition. It would not have been difficult for Green Tree, through counsel, to make an inquiry into the Manufactured Home's insurance status prior to filing the Motion.

Under these circumstances, the better practice would be to inquire with Debtor's counsel prior to filing the Motion. Under SC LBR 9013-1(b), counsel has a duty to confer with opposing counsel to coordinate the scheduling of motions for relief. It would not be difficult for counsel to also inquire about the insurance status of a manufactured home when contacting opposing counsel for scheduling purposes. Additionally, seven months passed between the mailing of the Insurance Letters that Green Tree appears to rely on and the filing of the Motion. Considering that there is a reasonable chance that a debtor may obtain her own insurance over a seven-month period, the better practice suggests that, under the circumstances, an additional inquiry should be made about the insurance status prior to filing a motion.

Nevertheless, in the present matter, the Court is unable to award sanctions under Fed. R. Bankr. P. 9011(c) because Debtor's request is not procedurally proper. Rule 9011 provides in pertinent part:

(b) Representations to the court

By presenting to the court (whether by signing, filing, submitting, or later advocating) a petition, pleading, written motion, or other paper, an attorney or unrepresented party is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances, --

- (1) it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;
- (2) the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;
- (3) the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and
- (4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief.

(c) Sanctions

If after notice and a reasonable opportunity to respond, the court determines that subdivision (b) has been violated, the court may, subject to the conditions stated below, impose an appropriate sanction upon the attorneys, law firms, or parties that have violated subdivision (b) or are responsible for the violation.

(1) How initiated

(A) By motion

A motion for sanctions under this rule shall be made separately from other motions or requests and shall describe the specific conduct alleged to violate subsection (b). It shall be served as provided in Rule 7004. The motion for sanctions may not be filed with or presented to the court unless, within 21 days after service of the motion (or such other period as the court may prescribe), the challenged paper, claim, defense, contention, allegation, or denial is not withdrawn or appropriately corrected

"Courts have strictly interpreted the procedural requirements outlined in subsection (c) and have held that requests for sanctions under that rule are improperly made if they are included as an additional prayer for relief contained in another motion." In re Sammon, 253 B.R. 672, 678

(Bankr. D.S.C. Sept. 7, 2000) (citing Anderson v. Simchon (In re Southern Textile Knitters, Inc.), C/A No. 98-07203-W; Adv. Pro. No. 99-80026-W, 2000 WL 33709686 (Bankr. D.S.C. Aug. 18, 2000)). For the Court to impose sanctions by motion under Fed. R. Bankr. P. 9011, parties must follow a two-step process: (1) serve the motion for sanctions on the opposing party and (2) file the motion with the Court if the sanctionable activity is not withdrawn or corrected within 21 days after service of the motion.

In the instant case, Debtor did not file a separate motion for sanctions. Debtor's request for sanctions was included as an additional prayer in her objection to the Motion. Additionally, Debtor failed to serve her request for sanctions on Green Tree twenty-one days prior to filing that request with the Court. "The plain language of the rule indicates that this notice and opportunity prior to filing is mandatory." Id. at 680. Because Debtor's request for sanctions is not procedurally proper under Fed. R. Bankr. P. 9011, the Court is unable to award sanctions against Green Tree and its counsel under that authority.⁷

3. Attorney's Fees and Costs for the Motion

At the hearing, Green Tree requested an award of attorney's fees and costs for the prosecution of the Motion. The Retail Installment Contract provides that the borrower may be liable for Green Tree's attorney's fees and costs for bringing an action to enforce the agreement.

As previously discussed, the Court finds that Green Tree did not conduct a reasonable inquiry under the circumstances prior to filing the Motion. It appears that Green Tree realized the erroneous allegations included in its Motion regarding the Manufactured Home's insurance status and, as a result, substantially changed its grounds for relief at the hearing. Due to its failure to conduct a reasonable inquiry, Green Tree forced Debtor to object to the Motion and incur

⁷ Additional authority may exist for Debtor to be awarded attorney's fees and costs for defending the Motion; however, in this matter, the Court was only presented with a request for an award under Fed. R. Bankr. P. 9011.

additional costs while generating its own fees and costs by proceeding with a motion based on unsubstantiated allegations. It was happenstance that, after the Motion was filed, Green Tree could proceed on the basis that the coverage on Debtor's insurance policy was less than Green Tree's allowed secured claim. A reasonable inquiry would have discovered this fact and may have prevented the filing of the Motion altogether. Therefore, the Court finds that it would not be proper to award attorney's fees to Green Tree when Green Tree's own conduct created its costs and fees associated with the Motion.

Furthermore, Green Tree did not present to the Court any evidence regarding the amount of attorney's fees and costs for the work involved to prosecute the Motion. Without this information, the Court cannot conduct a meaningful analysis regarding Green Tree's attorney's fees and costs, including the reasonableness of such fees. For these reasons, the Court denies Green Tree's request for attorney's fees and costs, and Green Tree shall not charge or attempt to recover the attorney's fees and costs associated with this Motion from Debtor.

CONCLUSION

For the foregoing reasons, the Court denies Green Tree's Motion upon the following conditions: Debtor obtaining within thirty days from the entry of this Order a new insurance policy or increasing coverage on her current insurance policy on the Manufactured Home to cover Green Tree's allowed secured claim in the amount of \$17,000.00. Should Debtor fail to provide proof to Green Tree of insurance coverage in that amount by the deadline set forth in this Order, Green Tree may submit an affidavit of default and proposed order and the Court may lift the automatic stay, without further notice or hearing, to allow Green Tree to proceed with its state court remedies against the Manufactured Home.

Additionally, Debtor's request for attorney's fees and sanctions is denied because the request is not procedurally proper under Fed. R. Bankr. P. 9011. Furthermore, Green Tree's request for attorney's fees is denied and Green Tree shall not charge or attempt to recover the attorney's fees and costs associated with the Motion from Debtor.

AND IT IS SO ORDERED.

**FILED BY THE COURT
09/09/2015**



Entered: 09/09/2015

US Bankruptcy Judge
District of South Carolina